IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 729 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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SARDARBHAI LILABHAI PARMAR & 4 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PM VYAS for Appellant(s) : 1 - 5
MRS HB PUNANI, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 17/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.This appeal under Sec.374 of the Code of

Criminal Procedure ('the Code' for short) has been filed by the appellants-original accused Nos.1 to 5, who, along with original accused Nos.6 and 7, were charged and tried for the offences punishable under Sections 147, 148, 149, 302, 323 and Section 120 of IPC read with Section 34 of Indian Penal Code and Section 135 of Bombay Police Act in Sessions Case No.179 of 1998 and on conclusion of trial, the appellants-original accused Nos.1 to 5 were convicted for the offence punishable under Sec.302 read with Sec.34 of IPC and sentenced to suffer RI for life and to pay fine of Rs.250/-, in default, to suffer SI for further one month, by the learned Additional Sessions Judge, Kheda at Nadiad vide judgment and order dated 18-6-1999. However, the original accused Nos.6 and 7 were acquitted of all the charges levelled against them.

2. It is required to be noted that the State has not preferred any appeal against the acquittal of the original accused Nos.6 and 7 and hence, it has become final between the parties.

3. The case of the prosecution in short is that on 1-3-1998 at about 9.45 to 10.00 a.m., the complainant and his colleague, Ramsinh Babubhai Dabhi were proceeding towards Khodiyarmata Temple on Hero Honda motor

cycle. When they reached very near to Arjanpurkot Village, the accused armed with deadly weapons like dharia etc. intercepted the complainant and told him that his brother Himmatsinh @ Kabhai misbehaved with the daughter of Kalabhai Manabhai during parliamentary election and, therefore, some altercation took place. They gave fist and kick blows to complainant and his colleague. At that time, deceased Himmatsinh and one Dalpatbhai Babubhai were coming on a tractor at which point of time, Sardarbhai Lilabhai gave dharia blow to Himmatsinh. When Dalpatbhai Babubhai tried to save himself, he received dharia blow injury on left thumb and when said blow dashed with the steering of the tractor held by the deceased Himmatsinh, Himmatsinh received injuries on his thumb resulting into its amputation. Himmatsinh tried to save himself by running but he could not succeed as accused chased him from behind with deadly weapons and gave various blows due to which, deceased Himmatsinh received grievous injuries on vital parts of his body. As the complainant and others shouted for help, accused ran away with their weapons. Thereafter, complainant and others arranged for tractor and took the injured Himmatsinh to the residence of Narendrabhai Sodha from where he was taken to Nadiad Civil Hospital

in Tata Mobil van. On examination, the doctor at Nadiad Civil Hospital declared him dead. As it was a medico-legal case, doctor informed about the same to Nadiad Police Station by telephone vardhy at 1315 hrs. Meanwhile, Chaklasi Police Station also received telephonic vardhy at 12 O'clock regarding the quarrel having taken place. In pursuance of which, PSI, Shri A.R.Patel of Chaklasi Police Station went to Nadiad Civil Hospital at 1400 hours and recorded the complaint given by brother of the victim, Vikramsinh Udaysinh Parmar. Thereafter, he sent the same along with report to PSO, Chaklasi Police Station for registering the offence and offence was registered as Chaklasi Police Station I.C.R.No.55 of 1998. Further investigation was handed over by PSO to PSI, Mr.Patel and, therefore, he kept the telephonic vardhy and other papers of investigation in the investigation file. He also prepared inquest panchnama in presence of panchas. He handed over Marnotar Form and Yadi to Medical Officer for performing post mortem on the dead body of the deceased. Thereafter, he went to Arjanpurkot Village and prepared panchnama of scene of offence in presence of panchas and also seized muddamal. He also recorded statements of various witnesses and deputed police

personnel for searching the accused. On 2-3-1998, he again recorded statements of various witnesses and also seized clothes of the deceased on production of the same by PSO after preparing panchnama. Thereafter, he arrested all the accused between 2nd and 5th March, 1998 by preparing arrest panchnama. He attached muddamal weapons produced by accused by drawing panchnama and also seized clothes of the accused and accused were sent to judicial custody on 6-3-1998. He sent the muddamal with forwarding letter to FSL for analysis. On receipt of FSL report, injury certificate and post mortem note, same were kept in investigation file. On completion of investigation, he submitted the charge sheet into the Court of learned Chief Judicial Magistrate, Nadiad, against seven accused.

4.As the offences alleged against the accused were exclusively triable by the Court of Sessions, learned Chief Judicial Magistrate, Nadiad, committed the case to the Court of Sessions, Kheda at Nadiad, where it was numbered as Sessions Case No.179 of 1998 and transferred to the Court of learned Addl. Sessions Judge. Learned Addl. Sessions Judge framed charge at Exh.5 against the accused. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

5.To prove the charge against the appellants-accused and other accused, prosecution examined the following witnesses:

1)P.W.1, Dr.Nashar Kayambhai Desar, Exh.1, the doctor who performed post mortem on the dead body of the deceased and treated the injured Dalpatsinh.

2)P.W.2, Vikramsinh Udesinh Parmar, Exh.33, the complainant, an eye witness and also brother of the deceased.

3)P.W.3, Dr.Jatinbhai Bansilal Shah, Exh.34 the doctor, who examined Dalpatsinh.

4)P.W.4, Balabhai @ Chadabhai Jagabhai Bhojani, Exh.37, father of Dalpatsinh.

5)P.W.5, Dalpatsinh Balusinh Bhojani, Exh.38, an injured eye witness, who gave his own case history as well as of Himmatsinh.

6)P.W.6, Samantsinh Udesinh Parmar, Exh.48, brother of the deceased.

7)P.W.7, Bharatbhai Shivabhai Dabhi, Exh.41, panch of panchnama of scene of offence.

8)P.W.8, Bhupatsinh Shankarbhai Sodha, Exh.45, panch of panchnama of physical condition of accused. He was declared as hostile.

9)P.W.9, Bharatsinh Chatrasinh Sodha, Exh.46, panch of arrest panchnama of accused. He was also declared as hostile.

10)P.W.10, Arvindbhai Ranchhodbhai Patel, Exh.54, Investigating Officer, who was Senior PSI at Chaklasi Police Station at the

relevant time and who recorded the FIR.

The prosecution also placed reliance upon the following documentary evidence:-

i) Complaint Exh.55,

ii) Yadi Exh.20,

iii) Telephone vardhy Exh.21,

iv) Registration of Janvajog Entry No.6/98 Exh.22,

v) inquest panchnama Exh.23,

vi) panchnama of seizure of clothes of the deceased Exh.24,

vii) panchnama of physical condition of accused Exhs.25 and 47,

viii) Post mortem note of deceased Exh.17,

ix) Forwarding letter to FSL Exh.26,

x) Note forwarding muddamal to FSL Exh.27,

xi) FSL Receipt Exh.28,

xii) FSL Reports Exhs.29 and 30,

xiii) Panchnama of scene of offence Exh.42,

xiv) Panchnama of production of weapons by accused Exh.48,

xv) Discovery panchnama of sticks Exh.49 and

xvi) Map of scene of offence Exh.57.

6. On submission of closing purshis by the prosecution, learned Addl. Sessions Judge, Kheda at Nadiad, recorded further statement of the accused under Sec.313 of Cr.P.C. and asked incriminating questions to the accused.

7. Upon hearing the learned counsel appearing

for the respective parties, learned Addl. Sessions Judge delivered the aforesaid judgment and order whereby original accused Nos.1 to 5 were convicted for the offence under Sec.302 read with Sec.34 of IPC to suffer RI for life and to pay fine of Rs.250/-, in default, to suffer SI for further one month while original accused Nos.6 and 7 were acquitted of all the charges levelled against them. It is this judgment and order of conviction and sentence which is giving rise for the original accused Nos.1 to 5, the appellants herein, to prefer the present appeal.

8. Heard learned counsel for the appellants, Mr.P.M.Vyas and on behalf of the respondent-State, learned APP, Ms.H.B.Punani.

9. Mr.Vyas has mainly argued that there is a delay in filing the FIR and it has not been properly explained by the prosecution. According to him, panchnama of recovery of muddamal weapons is a joint panchnama and, therefore, it cannot be said to be a discovery panchnama in the eye of law. Even panchas have also not supported the say of the prosecution regarding the alleged panchnama. The blood stain marks on the weapons are found to be of human blood but blood group has not been determined and hence, it cannot be said that muddamal

weapons have been used by the accused in the commission of offence. No panchnama of either tractor-trolley or mobil van has been drawn nor any witness has been examined to that effect and, therefore, according to him, the story put forward by the prosecution that the complainant was in the above referred vehicle cannot be accepted.

10. It is further argued that Vikramsinh Udesinh Parmar is not an eye witness and if he is treated to be an eye witness then, he can be said to be a got up witness and he being the brother of the deceased can be said to be an interested witness. As far as the evidence of other eye witness Dalpatsinh Balusinh is concerned, prosecution has failed to prove that Dalpatsinh received injury in this incident. Moreover, he did not accompany the deceased to Civil Hospital. Therefore, it is contended that evidence of Dalpatsinh is also required to be discarded. It is also contended that witness Balabhai @ Chadabhai Jagabhai Bhojani, Exh.37, is not an eye witness. In this connection, he has taken us through the oral evidence of Balabhai and contended that there is a distance between scene of offence and agricultural field of Dalpatsinh. On comparing the evidence of Balabhai with that of Dalpatsinh, it is contended that

Dalpatsinh could not have seen the incident nor recognized the persons from the field and, therefore, he ought not to have been treated as eye witness.

11. It is further contended that the Investigating Officers have not recorded the statements of persons, who were doing agricultural activities in the field and from whom the deceased has taken the tractor. Though they are material witnesses, they have not been examined by the prosecution and since prosecution has not come with clean hands, the story put up by the prosecution should not be believed. Drawing our attention towards the case papers of deceased Himmatsinh and Dalpatsinh along with the alleged history given by Dalpatsinh in both cases allegedly recorded by the concerned doctor, it is contended that no details including the names of the assailants have been given by Dalpatsinh in case papers and, therefore, the complaint filed later on is a concoction involving falsely the other accused into the crime in question.

12. A doubt has been raised about the evidence of the complainant by contending that telephonic vardhy given by the doctor is required to be treated as FIR instead of the version given by Vikramsinh. He has also

taken us through the post mortem note, case papers and oral evidence of Dr.Nashar and contended that medical evidence does not tally with the oral evidence of eye witness including the injury etc. and, therefore, Court below ought to have believed the say of Dr.Nashar instead of eye witness.

13. It is lastly contended that at the most, it is an incident which has taken place in a spur of moment but appellants have been convicted under Section 302 read with Section 34 of IPC and hence, individual act of particular accused is required to be taken into consideration. Looking to the evidence on record and also the fact that the appellants have already undergone practically more than 8-9 years of imprisonment, appeal may be allowed treating the sentence already undergone by them as a sufficient and proper sentence.

14. Learned APP, Mrs.Punani, has vehemently contended that there is no delay in filing the FIR. Taking us through the oral evidence of various witnesses as well as the reasoned judgment delivered by the court below, it is contended that looking to the way in which the incident has taken place and considering the distance between the scene of offence and the Nadiad Police Station and also considering the vehicle

available to the party concerned, no delay seems to have caused. At the earliest opportunity, FIR has been filed by the brother of the victim.

15. According to her, complainant is the witness of incident. Drawing our attention towards the panchnama of scene of offence, it is contended that motor cycle is seen at the place of scene of offence. Merely because the complainant is the brother of the victim, his evidence cannot be discarded. The Court below has rightly given weightage to the evidence of the complainant after minutely scrutinizing the same. According to her, evidence of eye witness Dalpat and other eye witness connect the accused with the crime in question.

16. It is further contended that the incident has taken place in broad day light at about 10.00 a.m. The accused, the victim and the witnesses are from the same Village apart from they being relatives. First altercation and scuffle took place between the complainant and the accused and thereafter incident in question has been taken place. Therefore, there is no question of misidentification of the accused. Showing us the medical evidence, evidence of eye witnesses together with the law laid down by the Apex Court on this point, it is

contended that if the evidence of eye witnesses are trustworthy and free from doubts, then evidence of eye witnesses may surpass the evidence of medical expert.

17. As regards recovery of weapon, it is contended by her that weapons have been produced by the accused. Once the weapons have been produced by the accused, they cannot take disadvantage of it later on by saying that no blood has been found on the weapons which apparently have been produced by them. It has also been contended that human blood found on the clothes of the accused tally with the blood group of the deceased. As regards non-examination of other witness, it is contended that since other witnesses, who have not been examined by the prosecution, would be giving evidence similar to the version given by main witnesses, they have not been examined. Moreover, it is the privilege of the prosecution as to whom they should examine and whom they should not. However, no prejudice has been caused to the otherside in not examining the witnesses as they would be repetition of evidence of main witnesses and non-examination of those witnesses is not fatal to the case of the prosecution.

18. According to Ms.Punani, even motive has also been established by the prosecution in this

case. According to her, it is a well planned serious murder wherein all the accused armed with deadly weapons with definite common intention were waiting for the arrival of the deceased and on arrival of the victim and other persons at the place of incident, they selected only the victim. Though the victim tried to escape, he could not as the accused chased him from behind and he has been mercilessly killed and hence, it is submitted that no mercy is required to be shown to them. It is therefore prayed that the impugned judgment and order does not require any interference in the present appeal.

19. We have gone through the oral as well as the documentary evidence shown to us by the learned counsel for the respective parties as well as the judgment impugned.

20. It is required to be noted that charge sheet has been filed against seven accused for the offences punishable under Sections 147, 148, 149, 302, 323 and 120 read with Section 34 of IP Code as well as Section 135 of BP Act and charge has also been framed under those sections. However, at the end of trial, original accused Nos.6 and 7 were acquitted of all the charges levelled against them. As far as the present appellants-original accused Nos.1 to 5 are concerned, they have

been convicted under Section 302 read with Section 34 of IP Code and have been acquitted of other charges. As the State has not preferred any appeal against the acquittal of accused Nos.6 and 7, it has become final qua them.

21. It is required to be noted that the accused, the victim, the complainant and all the witnesses are from the same Village. They are from the same community and related to each other. Incident has been taken place in broad day light at about 10.00 a.m. and prior to the incident, some altercation and scuffle took place between the complainant and the accused and thereafter, incident in question has taken place and, therefore, question of misidentification of the accused may not arise at all. Keeping in mind the above admitted facts, we proceed further.

22. The case of the prosecution is based on the evidence of eye witnesses. In all, there are three eye witnesses namely P.W.2, Vikramsinh Udesinh Parmar, Exh.33, P.W.4, Balabhai @ Chadabhai Jagabhai Bhojani, Exh.37 and P.W.5, Dalpatsinh Balusinh Bhojani, Exh.38 of which, P.W.5 Dalpatsinh Balusinh is the injured eye witness while P.W.2, Vikramsinh Udesinh Parmar is the complainant and also an eye witness. According to Balabhai @ Chadabhai Jagabhai Bhojani, P.W.4, he is

having agricultural field in the said Village and deceased Himmatsinh had sent Bhemabhai along with the contractor for agricultural purpose in his field. He has further deposed that he, his son Dalpatsinh and tractor driver Bhemabhai were there in the field when victim Himmatsinh came there. Thereafter, Himmatsinh along with Dalpatsinh went towards Nanavagha Village. From the evidence of above referred witnesses, prosecution could prove that Himmatsinh and Dalpatsinh left the agricultural field in tractor driven by the victim in which Dalpatsinh was sitting beside him. Immediately thereafter, incident in question has taken place. According to the above witness, he came to know of the incident from Vakhatsinh who is a nephew of the victim. He has been thoroughly cross-examined. He has fairly admitted that he could not see anything that has happened in the house of Kalabhai. He has also admitted that he could not identify the accused from his field.

23. The evidence of afore referred witness will be beneficial to the prosecution to indicate that on the day of incident at about 10.00 a.m., Himmatsinh went to the field of above witness and thereafter Himmatsinh along with Dalpatsinh left the field along with tractor

driven by Himmatsinh and immediately thereafter incident has taken place and, therefore, prosecution is able to establish that at the time of incident, Himmatsinh and Dalpatsinh were travelling in the tractor. It is also established from the evidence of Dr.Nashar as well as from the injury certificate of Dalpatsinh along with oral evidence of P.W.3, Dr.Jatinbhai Bansilal Shah, Exh.34 that Dalpatsinh has received thumb injury and has been initially treated at Civil Hospital, Nadiad, and thereafter by Dr.Jatinbhai as he has been referred to him and, therefore, prosecution is able to establish beyond reasonable doubt that Dalpatsinh was with Himmatsinh at the time of incident and he received injuries in the said incident and has been treated. On an evaluation of the evidence of Dalpatsinh, we believe that court below has rightly held that Dalpatsinhh is an injured eye witness.

24.It is required to be noted that driver of Himmatsinh, Bhemabhai's statement has not been recorded. However, on going through the deposition of P.W.4, Balabhai @ Chadabhai Jagabhai Bhojani, Exh.37, we believe that had Bhemabhai been examined, he would have given a version similar to that given by Balabhai. Therefore, if two witnesses have

not been examined by the prosecution on a single point then, at the most, it can be said that the prosecution did not want to repeat the similar version. Law in this regard has been settled and, hence, if prosecution has not examined Bhemabhai, it will not in any way prejudice the case of the prosecution. Reliance is however placed on **(2006)2 Supreme Court Cases (Cri) 353** in the case of State of A.P. Vs. S.Rayappa and Others wherein while dealing with the question regarding non-examination of independent witnesses, it was held as under:

"Regarding non-examination of an independent witness, PW 9 K. Bhupal Singh, the investigating officer stated that on that day he went to the place of incident and inquired about the witness but none came forward to reveal about the case due to fear. He has also stated that due to double murder in the town in a single day there was terror in public and he imposed Section 144. In such a situation surcharged with tension and fear psychosis it is not expected of any witness to come and depose about the incident even though they may have seen. Non-examination of independent witnesses, in such a situation, would be no ground to discard the otherwise creditworthy testimony of PW 1 and PW 2, which inspires confidence."

25.As stated above, P.W.5, Dalpatsinh Balusinh Bhojani, Exh.38, is an injured eye witness and his presence has been established through the testimonies of P.W.4, Balabhai

@ Chadabhai Jagabhai Bhojani, Exh.37, P.W.2, Vikramsinh Udaysinh Parmar, complainant, P.W.1, Dr.Nashar Kayambhai Desar, Exh.16 and P.W.3, Dr.Jatinbhai Bansilal Shah, Exh.34. Dalpatsinh has categorically deposed that at the time of incident, he and the deceased Himmatsinh were travelling in a tractor driven by the deceased Himmatsinh as they wanted to see Gothabhai Sodha of Nanavagha Village. When they reached very near to the scene of offence, complainant, brother of the victim and Ramsinh Babubhai were there with the accused, who were standing with deadly weapons like dharia, stick, etc. Since they saw brother of the victim Vikramsinh and Ramsinh Babubhai there, they stopped the tractor. He has also deposed the names of all the accused in the history given by him to the doctor concerned along with weapons held by the respective accused. He has further deposed that the accused Sardarbhai Lilabhai has given dharia blow to deceased. As per his evidence, he has tried to stop the said blow due to which, he received injury on his left thumb. Since said dharia dashed with the steering of the tractor held by Himmatsinh, Himmatsinh lost his thumb and, therefore, Himmatsinh has tried to escape from the scene of offence but accused chased him with

deadly weapons and they covered him and gave blows with dharia and stick on various parts of the body of the deceased. He has also described detailed account of the weapons used by the respective accused. According to him, he and the complainant shouted for help and as the accused were coming towards them, he left the scene of offence. Thereafter, he went to Civil Hospital, Nadiad, on his own and thereafter he was taken to the hospital of Dr.Jatinbhai wherein he has given the names of the accused in the history taken by the doctor. It is true that he has given names of 2-3 persons and stated others as the family members. He has also identified the accused as well as the muddamal into the Court. He has been thoroughly cross examined by the learned counsel for the accused wherein except some minor contradictions, his testimony qua the material evidence remains uncontroverted.

26.As stated earlier, we may say at the cost of repetition that he is an injured eye witness. His presence has been established at the scene of offence. Not only that, prosecution also got support from the evidence of complainant, P.W.2, Vikramsinh Udesinh Parmar, who is the brother of deceased Himmatsinh. He has fully supported

the say of Dalpatsinh and therefore, we are not reproducing his evidence. However, we would like to say that he is also an eye witness as established from the panchnama of scene of offence Exh.42 wherein his motor cycle has been shown along with tractor at the scene of offence. Not only that, it is he, who took his brother Himmatsinh first to Narendrabhai's house and thereafter to Civil Hospital at Nadiad and has given detailed complaint at the earliest opportunity. It is required to be noted that the complaint Exh.55 has been recorded at the instance of complainant wherein he has given names of all accused and the respective weapons held by them as well as blows given to the deceased. He has also narrated the motive in the complaint and it has been discussed so by the court below. We therefore hold that the telephone vardhy given by the doctor from the Civil Hospital, Nadiad, is not required to be treated as FIR because it is a cryptic one but the complaint Exh.55 given by the brother of the victim is to be treated as FIR. Law on this point is clear that if vardhy is cryptic and does not disclose the details of the offence, then, it cannot be treated as FIR and, therefore, court below has rightly treated the complaint Exh.55 as FIR wherein the incident

has been narrated in detail. Not only that, merely because the complainant is the brother of the victim, his evidence cannot be discarded. The Apex Court in the case reported in State of A.P. Vs. S.Rayappa and Others (supra) has held as under:

> "By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.
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> 7. On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is

that the testimony of the relative witnesses should be examined cautiously."

27. In view of the aforesaid settled law by the Apex Court, what is required to be done by the court is to evaluate cautiously the evidence of interested witnesses or relatives and if Court comes to the conclusion that their evidence are trustworthy and reliable, then, it can be relied upon for basing conviction. In this case, in addition to the evidence of complainant, Vikramsinh Udesinh Parmar, the prosecution is having another independent corroborative evidence of Dalpatsinh Balusinh Bhojani, an injured eye witness.

28. From the afore referred evidence of three witnesses, prosecution is able to prove the incident in question. The presence of the accused with deadly weapons along with their respective acts have also been established in this incident. Not only that, the intention of the accused is also established. Their intention was to kill only Himmatsinh and, therefore, they have not touched any other person but chased only Himmatsinh and brutally killed him which has also been proved by the prosecution.

29. A contention has been raised by Mr.Vyas after taking us through the evidence of P.W.1, Dr.Nashar Kayambhai Desar, that the

prosecution has failed to link the injuries with the weapons and since the medical evidence does not support the say of the eye witnesses, then, appellants are required to be acquitted.

30.We have also gone through the evidence of P.W.1, Dr.Nashar. In his examination-in-chief, he has deposed that he has noticed ten external injuries on the body of the deceased and corresponding internal injuries. He has further deposed that Himmatsinh had died due to shock on account of extensive hemorrhage due to injuries on his body.

He has deposed that Himmatsinh was brought by one Dalpatsinh. That Dalpatsinh, who was injured had informed him that he had sustained injuries while trying to save Himmatsinh. He has also deposed that Dalpatsinh had informed him that Sardarsinh Lilabhai had attacked Himmatsinh with dharia, and that he had recorded the said history in the case papers of Dalpatsinh. He has further deposed that Dalpatsinh had sustained two injuries and that the said injuries can be caused by a sharp weapon like dharia. He has also deposed that the injuries sustained by deceased Himmatsinh can be caused by sharp edged weapon like dharia etc.

In his cross-examination, he has admitted that the history was narrated to him by Dalpatsinh and that he had noted it down at that time itself and had given vardhy accordingly to PSO Pravinsinh on telephone. He has admitted that as per the history given by Dalpatsinh the name of the assailant was Sardarsinh Lilabhai and in the case of Himmatsinh, he had given history to the effect that the assailants were Budhabhai, Sardarbhai and his family. He has admitted that histories recorded vide Exh.18 and Exh.19 were given at the same time.

In his cross-examination, he has admitted that as per his opinion, injury No.4 on Himmatsinh's body whereby the thumb of his right hand has been severed and the injury resulting in the wound on the palm of Dalpatsinh's left hand cannot be caused by the same blow.

31. From the testimony of Dr.Nashar, it is clearly borne out that Dalpatsinh had named the assailants at the very first opportunity while narrating the history before the doctor. It is true that he has not named all the assailants but he has named Budhabhai, Sardarbhai and his family members. In view of the above, it can be said that he has given names of the above assailants and their family members and in

the history, detailed description of the names of each assailants is not required to be given. In these circumstances, the thing which he has narrated in the history, according to us, is more than sufficient. Therefore, the contention raised by the learned counsel for the appellant has no substance.

32. Much stress has been laid down by the learned counsel for the appellants that it has come out in the cross-examination of the doctor that the injuries resulting in severance of Himmatsinh's right thumb and the injury on Dalpatsinh's left palm cannot be caused by the same blow, to submit that the evidence of the doctor belies the prosecution story. The said contention does not merit acceptance in view of the fact that the doctor is an expert in so far as the injuries caused to the patient are concerned and as to whether the same could or could not have been caused by the weapons allegedly used by the assailants, but the doctor is not an expert on the subject as regards how the blow could have landed on the victims and whether the same blow could have caused the two injuries. Therefore, much significance cannot be attached to the said opinion of the doctor.

33. In any case, the legal position regarding

medical evidence vis-a-vis ocular evidence has been settled by umpteen decisions of the Apex Court. In the case of Ramanand Yadav v. Prabhu Nath Jha, (2003)12 SC 606, the Supreme Court has held that so far as variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. The Court held that over-dependence on the opinion expressed by a medical witness, even if he is an expert in the field, to checkmate the direct testimony given by an eye-witness is not a safe modus adoptable in criminal cases. It was further held that it has now become axiomatic that medical evidence can be used to repel the testimony of eye-witnesses only if it is so conclusive as to rule out even the possibility of the eye-witness version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features, which he noticed in the medical report, may express his views one way or the other depending upon the manner the question was asked. But the answers given by the medical witness to such questions need not become the last word on such possibilities. After all, he gives only

his opinion regarding such questions. But to discard the testimony of an eye-witness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice.

34. In view of the above evidence of Dr.Nashar, the aspects emerged from the record that there are 10 injuries as per column No.17 of the post mortem note. According to the doctor, all the injuries were ante-mortem. The doctor has also opined that injuries sustained by the deceased were sufficient to cause his death in the ordinary course of nature. Even clothes of the deceased are also having cut marks which have also been proved by the prosecution by way of panchnama Exh.24. It is true that panchnama of production of weapons is a common panchnama and cannot be treated as a discovery panchnama. It is to be noted that both the panchas have not supported the say of the prosecution though they admitted their signatures in the panchnama and panch slip. However, prosecution is able to prove the panchnama by way of evidence of Investigating Officer, Mr.A.R.Patel, P.W.10, Exh.54. Reliance is placed on the law laid down by the Apex Court in Paras Ram Vs. State of Haryana, (1992)4 SCC 662. Thus,

prosecution is able to prove the panchnama by way of evidence of Police Officer. FSL reports Exhs.29 and 30 show that muddamal weapons were having the human blood stain marks but blood group could not be identified. It is required to be noted that it has been produced by the accused and once having produced the weapons by the accused in such a manner, they cannot take disadvantage of their own wrong. The witnesses have identified the muddamal having human blood stains even in Court also.

35. As far as sentence awarded to the appellants is concerned, as stated earlier, they have been convicted for the offence under Sec.302 read with Sec.34 of IPC. It is to be noted that role of each of the appellants-accused has been independently established. Moreover, ingredients of Section 34 of IPC have also been proved beyond reasonable doubt. It is established that the appellants-accused have decided to kill Himmatsinh and for that, motive behind the incident in question is of the previous incident of 28th. They were waiting on the road with deadly weapons for the arrival of deceased. As soon as the accused reached the place of incident, they chased and assaulted and he was brutally killed wherein

the accused, who have been convicted by the court below, have played their active role with the weapons in their hands. Since the prosecution has proved the case against the accused beyond reasonable doubt, we are unable to accept the request made by the learned counsel for the appellants that they may be set at liberty forthwith treating the sentence already undergone as the sufficient sentence. Looking to the serious offence having proved against the appellants-accused beyond reasonable doubt, we are of the opinion that no mercy is required to be shown towards the appellants. Under the circumstances, the appeal is required to be dismissed.

36.The appeal is dismissed.

(R.P.DHOLAKIA,J.)

(HARSHA DEVANI,J.)

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